91-1575

No.

Supreme Court, U.S.
FILED
MAR 13 1992
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

RICHARD THOMPSON,

Petitioner,

against

STEVEN M. KRAMER,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does a defendant have a right to trial by jury on the question of plaintiff's citizenship in a diversity case?

2. If not, what standards are used to determine whether to send the issue to a jury and who decides?

3. May a directed verdict on liability be granted against defendant at the close of plaintiff's evidence?

## List of Parties

The parties who participated in the United States Court of Appeals for the Third Circuit are Richard Thompson and Steven M. Kramer.

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In The

SUPREME COURT OF THE UNITED STATES

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RICHARD THOMPSON,

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against

STEVEN M. KRAMER,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

Richard Thompson hereby petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit to review the judgment of the court entered October 15, 1991, reversing in part and affirming in part the judgments and orders of the United States District Court for the Eastern District of Pennsylvania.

## Opinions Below

On June 10, 1991, in an unpublished order, the United States Court of Appeals remanded this appeal to the United States District Court for the Eastern District of Pennsylvania, with directions to determine the existence of diversity jurisdiction. The Court of Appeals directed the District Court to "make findings of fact...." regarding plaintiff's claim of New York citizenship. The court retained jurisdiction. A copy of the Court of Appeals' order is attached hereto as Appendix A.

On July 2, 1991, the Court of Appeals denied defendant's motion to amend its order of June 10, 1991, to require or authorize a jury trial on diversity jurisdiction. A copy of the Court of Appeals' unpublished order is attached hereto as Appendix B.

On August 9, 1991, the District Court entered findings of fact, conclusions of law and an order sustaining its diversity jurisdic A copy of the District Court's unpublished decision is attached as Appendix C.

On October 15, 1991, the Court of Appeals filed a published opinion, reversing the grant of injunctive relief by the District Court. Kramer v. Thompson, 947 F.2d 666 (3d Cir. 1991). The opinion upheld (at note 5) the dispositive finding of the District Court that plaintiff is a citizen of New York under the "not clearly erroneous" standard of Rule 52(a), F.R. Civ. P. A copy of the published opinion is attached as Appendix D.

On October 15, 1991, the Court of Appeals filed a companion memorandum opinion affirming liability of defendant and reversing an award of damages. A

copy of the Court of Appeals' unpublished opinion is attached hereto as Appendix E.

On November 14, 1991, the Court of Appeals denied defendant's petition for rehearing with suggestion of rehearing in banc. A copy of the court's order is attached hereto as Appendix F.

## Jurisdiction

The judgment of the United States Court of Appeals, affirming in part and reversing in part the judgments and orders of the United States District Court for the Eastern District of Pennsylvania, was entered on October 15, 1991. Petitioner's timely petition to the Court of Appeals for rehearing before the entire court was denied on November 14, 1991. On January 31, 1992, this court (Souter, J.) granted petitioner's timely application to extend the time in which to file this petition to March 13, 1992. Thompson v. Kramer, No. A-548.

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

## Constitutional Provision Involved

### Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,...

## Statement of Case

Plaintiff Steven M. Kramer, an attorney, brought this action against Richard Thompson, his former client, for libel, on April 12, 1989, alleging jurisdiction of the District Court because of diversity of citizenship. Mr. Kramer alleged that he was a citizen of New York and that his former client was a citizen of Pennsylvania. Plaintiff demanded trial by jury.

On April 4, 1990, the district judge granted a directed verdict on liability in favor of plaintiff at the conclusion

of his case. The trial proceeded on damages only.

On April 6, 1990, a jury returned a verdict in favor of plaintiff in the amount of $100,000 compensatory damages and $38,000 punitive damages. On April 10, 1990, the District Court entered judgment on the jury verdict and permanently enjoined defendant from defaming plaintiff.

After post-trial motions were denied, defendant brought this appeal.

On September 12, 1990, defendant suggested to the Court of Appeals that the District Court lacked diversity jurisdiction because plaintiff had not proven he was a citizen of New York.

Defendant attached a deposition of plaintiff taken on February 2, 1989, in a collection action brought by West Publishing Company; plaintiff emphatically denied in answer to several

questions that he had a residence in New York. He testified that he lived with his mother in Philadelphia, and that he had done so for about one year prior to the taking of the deposition.

On June 10, 1991, the Court of Appeals remanded the action to the District Court for the limited purpose of deciding its jurisdiction, and required the District Court to make findings of fact on the question.

On June 10, 1991, the parties conferred with the district judge by telephone before anyone received the Court of Appeals' order of the same day. The district judge had received a telephone message from the clerk of the Court of Appeals, to the effect that the Court of Appeals had ordered the District Court hold a hearing on jurisdiction. Undersigned counsel for defendant said that defendant wanted a jury trial on the

issue of plaintiff's citizenship, and the district judge granted defendant's request. The court entered an order:

> "AND NOW, this 10th day of June, 1991, it is hereby ORDERED that the parties shall come to Courtroom 8B, on June 25, 1991, at 2:00 p.m., to pick a jury (emphasis supplied).
>
> "BY THE COURT:
> James T. Giles, J."

The next day, June 11, 1991, the District Court modified its order of June 10 as follows:

> "...Pursuant to the remand order of the third circuit,...There shall not be a jury trial as the issue of jurisdiction is a matter of law to be determined by the court."

On June 20, 1991, defendant served in the District Court a demand, or in the alternative, a motion for trial by jury on the jurisdictional issue. On the same date, defendant moved in the Court of Appeals to amend the Court of Appeals' order to require or authorize a jury trial.

On June 25, 1991, the District Court reaffirmed its reconsidered decision to hold a bench trial, although it purported to recognize that it possessed the discretion to hold a jury trial in spite of the Court of Appeals' order. The District Court said that it had decided to exercise its discretion in favor of a non-jury hearing in order to advance this matter in "a speedier and more efficient manner."

On June 26, 1991, the District Court held a bench trial on the issue of jurisdiction.

On July 2, 1991, the Court of Appeals denied defendant's motion to amend its June 10 order (Appendix B).

On August 9, 1991, the District Court filed a 7-page memorandum sustaining its diversity jurisdiction, resolving disputed questions of fact concerning the citizenship of Steven M.

Kramer, Esquire. The court weighed plaintiff's credibility in explaining away seemingly contradictory deposition testimony and decided to credit his hearing testimony over the transcript of his sworn deposition.

On October 15, 1991, the Court of Appeals summarily affirmed the decision of the District Court under Rule 52(a), insulating findings of a district judge from appellate review. The Court of Appeals also affirmed the grant of directed verdict before defendant opened his case.

Reasons for Granting Relief

1. The court should reexamine its seventy-seven year old precedent making a jury trial discretionary, and either recognize a right to trial by jury on jurisdictional matters or require standards for exercise of discretion.

The Court of Appeals order of June 10, 1991, precluded the District Court from submitting the factual issue of plaintiff's citizenship to a jury,

contrary to established case law that whether to do so is a matter of discretion on the part of the District Court. Gilbert v. David, 235 U.S. 561 (1915); Seideman v. Hamilton, 275 F.2d 224, 226 (3d Cir. 1960). Seideman was followed in McNello v. John B. Kelly, Inc., 283 F.2d 96 (3d Cir. 1960) (jury determination of citizenship affirmed). This had always been a jury case.

There is no principled reason to deny a party a jury trial on an issue of fact, hinging on credibility, in a jury case, merely because the fact is jurisdictional. The Seventh Amendment to the US Constitution should be applied to preserve a jury trial as a matter of right.

Following Gilbert, the Third Circuit in Seideman held that the District Court's exercise of discretion in its choice is unreviewable. This authorizes

arbitrary and capricious action by district courts, and as such violates due process guaranteed by the Fifth Amendment of the US Constitution.

Gilbert held (at 568):

> "But while the court might have submitted the question to the jury, it was not bound to do so; the parties having adduced their testimony, pro and con, it was the privilege of the court, if it saw fit, to dispose of the issue upon the testimony which was fully heard upon that subject."

This case illustrates that a jury trial may be essential to preserve the appearance of justice.

Plaintiff is a lawyer active in litigation in the District Court. Defendant is the lawyer's former client, and is deeply mistrustful of the entire system of justice. Defendant views most lawyers and judges as partners in a self-serving institution designed to aggrandize themselves at the expense of non-lawyer citizens. Indeed, this entire

case arises out of defendant's conviction that he had been abused by judges and lawyers.

By 1991, defendant was convinced that the district judge was partial to plaintiff. Defendant believed that the district judge erred repeatedly in plaintiff's favor. In light of the outcome of these appeals, this latter belief was founded. Whatever the foundation of defendant's beliefs about the district judge, they are at the core of the right to jury trial.

The district judge's belated comment that a bench trial would advance this matter in "a speedier and more efficient manner" was wrong. Had the question been tried by jury, the verdict would have been reached on June 26, 1991, one day after the jury was picked. The time to try the issue was about 3 hours. Instead, the district judge took 44 days

to file his findings and conclusions after the bench trial of June 26, 1991.

Moreover, speed and efficiency are not grounds for denying trial by jury, to which the Court of Appeals in another context said the case law attaches "almost talismanic significance." Published opinion, Appendix D, at 49.

2. The Court of Appeals sanctioned the departure by the lower court from the usual course of judicial proceedings, and decided a question in conflict with the First Circuit.

The Court of Appeals sanctioned the District Court's departure from accepted judicial proceedings by affirming the District Court's grant of plaintiff's motion for a directed verdict at the close of plaintiff's case before defendant opened his case.

A directed verdict was entered against defendant solely on the basis of plaintiff's case-in-chief. Mr. Thompson testified on direct examination as part

of plaintiff's case-in-chief. The District Court and the Court of Appeals concluded from defendant's testimony on direct examination that defendant had no defenses, and that his statements were defamatory as a matter of law.

The Court of Appeals, in its unpublished opinion, said "at no time during trial did Thompson ever raise a claim that some of his statements were protected or privileged. Hence, this argument was waived." Privilege is an affirmative defense [Spanel v. Pegler, 160 F.2d 619, 623 (2d Cir. 1947)], and would properly have been proven after defendant opened his case.

Neither the rules nor the case law authorize a directed verdict against a defendant before he has had a chance to present evidence. Gonzalez v. La Concorde Compagnie D' Assurances, 601 F.2d 606, 608 (1st Cir. 1979). Rule

50(a) of the F.R. Civ. P. says:

> "A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted... (emphasis supplied)."

The language of the rule indicates that after a party has rested, the case may be decided against it on the basis of the evidence the party itself introduced. The rule does not suggest that a verdict may be directed in favor of the party producing the evidence.

Gonzalez held at 608:

> "This rule is not peculiar to federal procedure, but expresses the general law that, after a party has rested, the case may be decided against it on the basis of the evidence the party itself introduced. It does not suggest that a verdict may be directed in favor of the party producing the evidence. Quite the contrary, it protects the moving party's right to continue with the trial and offer evidence."

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a writ of certiorari to the United States Court of Appeals be granted.

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Attorney for Defendant-
Appellant Richard Thompson

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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NOS. 90-1488 and 90-1640

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STEVEN M. KRAMER,

Appellee

v.

RICHARD THOMPSON,

Appellant

(D.C. Civ. No. 89-02679)

Present: BECKER, NYGAARD, and ALITO,
Circuit Judges.

Argued: November 30, 1990

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ORDER

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It appearing that the suggestion of defendant-appellant of lack of diversity jurisdiction must be decided by the district court before this court can dispose of the pending appeals, it is

ORDERED

that this case is remanded to the district court with directions to determine the existence vel non of diversity jurisdiction. The papers filed in this court by the parties relevant to this issue will be transmitted herewith. The district court shall decide whether to grant leave for discovery and whether to hold an evidentiary hearing. At all events, the district court shall make findings of fact and conclusions of law. This Court shall retain jurisdiction meanwhile.

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

DATED: June 10, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-1488 & 90-1640

June 25, 1991

KRAMER, STEVEN M.
vs.
THOMPSON, RICHARD
vs.
PENNA. SUPREME COURT LAWYER
DISCIPLINARY BOARD, et al.
Richard R. Thompson, Appellant
in Nos. 90-1488 & 90-1640
(E.D. PA D.C. Civil No. 89-02679)

Present: BECKER, NYGAARD, and ALITO,
Circuit Judges,

Motion by Appellant in Nos. 90-1488 & 90-1640 to amend Court order dated June 6, 1991, to require or authorize jury trial on diversity jurisdiction, which the Court may wish to treat as a Motion for Reconsideration of Court's 6/10/91 order,

Sent for the Court's information is a copy of the following:
Court's 6/10/91 order remanding the case to the district court, etc.,

/s/
Deputy Clerk
597-1092

Case was argued on 11/30/90.

----------O R D E R----------

The foregoing Motion is denied.

By the Court,

/s/ Edward R. Becker
Circuit Judge

Dated: July 2, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| STEVEN KRAMER | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| RICHARD THOMPSON | : | NO. 89-2679 |

MEMORANDUM

GILES, J. AUGUST 8, 1991

Plaintiff filed this complaint on April 12th, 1989. Diversity jurisdiction was alleged to exist pursuant to 28 U.S.C. Section 1332(a)(1).[1] A trial was held. Pursuant to a jury verdict judgment was entered in favor of plaintiff and against defendant. As part of his appeal of that final order to the Third Circuit, defendant challenged the exercise of jurisdiction based upon diversity of citizenship, alleging that at the time the suit was filed both

[1] At that time 28 U.S.C. Section 1332(a)(1) provided that "district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and is between . . . citizens of different States."

parties were citizens of Pennsylvania. Subsequently, pursuant to an order from the appeals court, a bench trial was held on June 26, 1991, to resolve the question of citizenship.[2] Having fully considered the evidence presented by both parties, this court concludes that diversity of citizenship did exist as of the filing of the complaint and makes the following findings of facts and conclusions of law:

FINDINGS OF FACT

1. Plaintiff contends that he is a citizen of the state of New York and was at the time that this action commenced. Transcript, 13-18.

2. Since 1986 plaintiff maintained and occupied a leased apartment in New York for himself, his companion Donna Groves, and their daughter Tara. Transcript, 8-11.

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[2]The transcript of that proceeding was not received u August 6, 1991.

3. Plaintiff considers Ms. Groves to be his common-law wife. For example, he represented that she was his spouse when he signed a lease for Philadelphia office space in the spring of 1988. Transcript, 28-29.

4. Plaintiff's life insurance policy was issued by a New York insurance firm. He expects that New York state will be the situs of the probate of his estate upon his death. Ms. Groves and the plaintiff's mother are the named beneficiaries of that policy. Transcript, 10.

5. Plaintiff has been registered to vote in New York as of February 12, 1988, and has voted in two New York elections, once in 1988 and once since. Transcript, 6-7. He was not registered to vote in the Commonwealth of Pennsylvania in 1988 or thereafter. Transcript, 8, 53.

6. Plaintiff's automobile insurance lists a New York address. Transcript, 6.

7. Plaintiff's Pennsylvania attorney identification cards, dated November 23, 1988, and July 5, 1989, list a New York address. Transcript, 6.

8. The cover page to plaintiff's 1988 personal federal income tax return lists a New York address. Transcript, 12.

9. Plaintiff has paid various New York state taxes. Transcript, 9.

10. During the relevant time period, plaintiff has maintained Pennsylvania addresses for business purposes only. Plaintiff has maintained these addresses in order to retain the Philadelphia-area business practice which he developed while formerly domiciled in Pennsylvania. Transcript, 24-28, 30-31.

11. Since 1988, plaintiff has maintained a business office in New York. Transcript, 9. While he currently lists a Philadelphia business address in the Legal Directory, mail received at that address is forwarded to his office in New York. In addition, plaintiff's Philadelphia business telephone number automatically transfers calls to his New York office. Transcript, 35-36. Plaintiff also maintains a business office in New Jersey. Transcript, 54-56.

12. In a 1987 suit, Kramer v. Kanner, Civil Action No. 87-3993, in which plaintiff was a party, the district court ruled that there was an absence of diversity of citizenship since plaintiff did not demonstrate at that time that he was a citizen of New York. Transcript, 22. However, most of the above-mentioned evidence demonstrating plaintiff's New York citizenship was not available or in

existence at that time, especially his subsequent voter registration and voting in New York.

13. Notwithstanding the above-mentioned ruling, plaintiff's 1987 assertion of New York citizenship did constitute a public declaration of his belief that he was, and would continue to be, a citizen of New York.

14. In a deposition taken on February 2, 1989, approximately two months before this suit was initiated, plaintiff stated that he was a resident of Pennsylvania. In the hearing before this court, plaintiff testified that at the time of the deposition he was temporarily residing at his mother's Philadelphia home as a result of a disagreement with and temporary separation from Ms. Groves. This court credits plaintiff's testimony that when deposed he named Philadelphia as his

residence because of this temporary separation, notwithstanding his continuing domicile in New York. In the deposition, he was not specifically asked about a New York domicile. Transcript, 37-40.

15. This court also credits plaintiff's testimony that he resided with his mother for approximately one month, and that any deposition statement to the contrary is the result of a transcription error. Transcript, 49-52.

16. While plaintiff made the above-mentioned assertion of Pennsylvania residency in the 1989 deposition, he did not, then or at any later time, assert Pennsylvania citizenship.

CONCLUSIONS OF LAW

1. To establish diversity of citizenship a party must demonstrate that it (1) is domiciled in a different state than that of the opposing party and (2)

is a United States citizen. These conditions must exist "at the time plaintiff commenced the action." Lang v. Windsor Mount Joy Mut. Ins Co., 487 F.Supp. 1303, 1305 and nn. 9-12 (E.D. Pa. 1980).

2. The party asserting federal jurisdiction "bears the burden of persuasion . . . and at least the initial burden of producing evidence in support of his claim of federal jurisdiction." Avins v. Hannum, 497 F.Supp. 930, 936 (E.D. Pa. 1980) (citations omitted).

3. There is a general presumption in favor of former domicile. Where a party asserts a change of citizenship is, it must demonstrate that change with clear and convincing evidence. Liakakos v. Cigna Corp., 704 F.Supp. 583, 586 (E.D. Pa. 1988); Avins, 497 F.Supp. at 936; Herzog v. Herzog, 333 F.Supp. 477, 478 (W.D. Pa. 1971); Hamlin v. Holland,

256 F.Supp. 25, 27 (E.D. Pa. 1966).

4. The party seeking to establish change of domicile must prove that it (1) resides in the alleged state of domicile and (2) has an indefinite intention to remain there. Morris v. Gilmer, 129 U.S. 315 (1889); Herzog, 333 F.Supp. at 478 (citing Texas v. Florida, 306 U.S. 398, 424 (1939)).

5. To establish domicile, the party asserting federal jurisdiction must prove that its presence in the alleged state of citizenship is not merely that of a transitory guest. Coggins v. Carpenter, 468 F.Supp. 270 (E.D. Pa. 1979). The court may consider where the majority of the party's business affiliations are, in which state it votes, where it pays taxes, in which state its nuclear family lives, and where it leases an apartment. If the party is married but has left its spouse, the

court may consider whether the separation is likely to be long-term and if the party intends to return to the former home. Cielicki v. Presbyterian-University Hospital, 383 F.Supp. 445, 449 (W.D. Pa. 1974).

6. Intent to remain is not based on subjective analysis but on the factual evidence before the court. Avins, 497 F.Supp. at 937. It is not "[p]roof of intent to remain permanently [that is] the test," but rather the intent to remain indefinitely. Krasnov v. Dinan, 465 F.2d 1298, 1300 (3d Cir. 1972). Courts may consider factors such as a person's "declarations, exercise of political rights, payment of personal taxes . . . and place of business." Id. at 1301 (quoting Wright, Federal Courts Section 26, at 87 (2d ed. 1970)). See also Avins, 497 F.Supp. at 937; Cielicki, 383 F.Supp. at 445.

7. In determining citizenship the court must consider and weigh all relevant factors. Avins, 497 F.Supp. at 939. Thus, no one factor will conclusively defeat plaintiff's assertion of citizenship. In this case, defendant relies heavily on plaintiff's business contacts in Pennsylvania, but these contacts do not contradict plaintiff's account of a multi-state business practice and a New York domicile. It is also clearly evidenced that plaintiff's brief period of residence in Philadelphia was due to a "marital" dispute between himself and Ms. Groves and was only a temporary separation.

8. Plaintiff has demonstrated his change of citizenship from Pennsylvania to New York based upon his prior and current declarations, voter registration, actual voting patterns, residential lease, payment of taxes, purchase of life

insurance, New York business office, and various listings of a New York address. This evidence satisfies the clear and convincing standard which a plaintiff must satisfy to establish diversity jurisdiction under 28 U.S.C. Section 1332(a)(1).

BY THE COURT:

/s/ James T. Giles

Filed October 15, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

Nos. 90-1488, 90-1640

---

STEVEN M. KRAMER,
*Appellee*

v.

RICHARD THOMPSON,
*Appellant*

---

On Appeal From The United States District Court
For The Eastern District of Pennsylvania
(D.C. Civ. No. 89-02679)

---

Argued: November 30, 1990
Filed: October 15, 1991

Before: BECKER, NYGAARD and ALITO,
*Circuit Judges.*

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**OPINION OF THE COURT**

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BECKER, *Circuit Judge.*

These appeals, from various injunctive orders and a damages judgment of the district court for the Eastern District of Pennsylvania in a bizarre libel case founded upon our diversity jurisdiction, present the interesting question under Pennsylvania law of the ability of a judge to enjoin future libels and to compel the retraction of past libels. For the reasons that follow, we will reverse the district court's orders enjoining defendant/appellant Richard Thompson from publishing further libels against plaintiff/appellee Steven M. Kramer, his former lawyer, and ordering Thompson to retract past libelous statements. The judgment awarding damages will be reversed and remanded for a new trial on damages for the reasons set forth in a companion opinion filed this day.

I. FACTS AND PROCEDURAL HISTORY

The parties' relationship began in July 1982, when Thompson retained Kramer to bring a securities fraud claim against Thompson's former broker, Prudential-Bache, Inc. No question was

raised by Thompson concerning Kramer's stewardship for the next three years. Indeed, during this time, Thompson wrote on several occasions praising Kramer's performance.[1] Then, in the fall of 1985, Kramer was contacted by an F.B.I. agent to whom Thompson previously had complained about his investment losses at Prudential-Bache. The agent asked Kramer whether the stocks at issue were completely worthless. Kramer responded that Thompson had purchased the stocks for roughly $120,000 and later had sold them for approximately $15,000. Thus, while informing the agent that Thompson had suffered a very substantial loss, Kramer also informed the agent that technically the stocks were not worthless. When Thompson learned of this conversation, however, he became enraged, and accused Kramer of deliberately dissuading the F.B.I. from investigating the matter. The parties' relationship deteriorated rapidly thereafter and, in October 1985, Thompson discharged Kramer as his counsel.

Seeking to ensure that he ultimately would be compensated for his services, Kramer refused to return the case files to Thompson until the latter agreed to deposit the proceeds of any future judgment or settlement with the court pending resolution of the attorney's fees issue. Thompson would not agree, and Kramer secured an order from the district court which provided that any funds recovered would be placed in escrow, and that the fee dispute would be arbitrated. Kramer then made the case files available to Thompson and his new counsel.

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1. Thompson is a self-employed exporter of pumps and other equipment and a self-styled consumer activist, who writes frequently under the letterhead of the "Thompson-American Antifraud League."

On February 4, 1986, Thompson wrote to the Disciplinary Board of the Pennsylvania Supreme Court (the "Disciplinary Board") alleging that Kramer had failed to represent him effectively in the Prudential-Bache action.[2] At about the same time, Thompson began writing a series of critical and accusatory letters about Kramer to various private attorneys, federal judges, F.B.I. agents, federal and state prosecutors, newspapers, and television stations in the Philadelphia area.[3] With varying degrees of repetition, these letters alleged that Kramer: (1) had "thrown" Thompson's case; (2) had deliberately destroyed certain documents related to the case; (3) had used drugs and was a member of the highly publicized "Yuppie Drug Ring" organized by Philadelphia dentist Lawrence Lavin;[4] (4) was connected to organized crime; and (5) had committed arson on his own car. Kramer demanded a retraction, but Thompson refused.

Kramer thereupon brought a libel action against Thompson in the Court of Common Pleas of Philadelphia County. Undaunted by Kramer's suit, Thompson continued his letter-writing campaign. The court eventually entered a default judgment on the issue of liability against Thompson for failure to comply with discovery.

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2. On April 8, 1986, the Disciplinary Board dismissed Thompson's complaint.

3. Thompson sent a total of at least 100 separate letters to 60 different individuals or entities.

4. Thompson's apparent basis for this accusation was Kramer's representation of several minority shareholders of WMOT Enterprises, Inc., a company which had been infiltrated and bilked of funds by one of Lavin's co-conspirators.

After the default judgment was entered against him, Thompson ceased to write critically about Kramer for approximately two years. In early 1989, however, Thompson became aware of a suit filed by Kramer in federal district court against Mano Arco, a garage that had performed repair work on Kramer's car. Kramer's suit alleged that Mano Arco's negligent workmanship had been responsible for the fire that engulfed his car while it was travelling on the New Jersey Turnpike. Thompson took it upon himself to contact, first by phone and then by letter, the lawyer for Mano Arco. After informing the lawyer of his view that Kramer had committed arson on his own car, Thompson resumed his accusations that Kramer had thrown Thompson's securities fraud case, and that he was involved in the Yuppie Drug Ring and the underworld. Thompson's letter to Mano Arco's attorney purported to be copied to the state Disciplinary Board, the federal judge hearing the case, The *Philadelphia Inquirer*, the United States Justice Department, and Kramer.

Kramer then filed the instant libel action in the United States District Court for the Eastern District of Pennsylvania, alleging diversity of citizenship.[5] Thompson filed an answer, naming

5. Thompson is a citizen of Pennsylvania. Kramer averred in his complaint that he is a citizen of New York, although he has law offices in Philadelphia. On September 12, 1990, while awaiting oral argument before this court, Thompson filed papers alleging that Kramer is actually a citizen of Pennsylvania and suggesting that diversity jurisdiction may be lacking. On June 10, 1991, we remanded to the district court for fact-finding regarding Kramer's citizenship for diversity jurisdiction purposes, but retained jurisdiction meanwhile. The district court, after a hearing, found that Kramer is a citizen of New York and therefore that diversity jurisdiction does exist. This finding is certainly not clearly erroneous.

thirteen third-party defendants and asserting counterclaims for libel and slander, legal malpractice, obstruction of justice, malicious prosecution, and civil RICO violations. The district court later dismissed the third-party defendants and the counterclaims, and imposed sanctions on Thompson with respect to one of the third-party defendants.

Trial commenced on April 2, 1990.[6] Having determined that Thompson's statements were *per se* libelous in that they were false and made in reckless disregard of their truth or falsity, the court directed a verdict for Kramer at the close of Kramer's case — i.e., without hearing Thompson's defense on the issue of liability. The court restricted the scope of Thompson's case to evidence relevant to the calculation of compensatory and punitive damages. Heeding the court's suggestion that his only hope for mitigating damages was to demonstrate contrition, Thompson took the witness stand, delivered a grudging and rambling apology, and promised not to publish future defamatory statements. Kramer cross-examined Thompson, challenging the sincerity of his apology, and Thompson rested.

After closing arguments, the court instructed the jury to award damages based only on those libelous statements issued between the filing of the state court action in February of 1986 and the filing of the federal court action in April of 1989, and to render its verdict in the form of special

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6. On the first day of trial, the district court granted Kramer's request for a restraining order that prohibited Thompson from transferring or encumbering his home, and from drawing on his corporate bank account, pending conclusion of the litigation.

interrogatories on compensatory and punitive damages. During its deliberations, the jury inquired whether it also could require Thompson to send a letter of retraction to all persons who had received the libelous communications. The court responded that it was inappropriate for the jury to do so, but assured the jury that the court would require Thompson to issue a retraction, in addition to whatever damages were awarded.

The jury ultimately awarded Kramer $100,000 in compensatory and $38,000 in punitive damages, and the district court entered judgment accordingly on April 10, 1990. The court simultaneously entered a permanent injunction, prohibiting Thompson from making further statements about Kramer of the type adjudged libelous, and ordering him to write letters of retraction to all persons who had received prior libelous communications.[7] Thompson's post-trial motions for judgment n.o.v. and for a new trial were denied. Thompson filed a timely notice of appeal (No. 90-1488).

After learning that Thompson had failed to send a retraction letter to all the required individuals in violation of the court's permanent injunction, Kramer moved to hold Thompson in contempt of court. Although declining to hold Thompson in civil contempt, the district court, *inter alia*, again ordered him to make the appropriate retractions.[8]

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7. The court also ordered that the restraining order regarding transfer or encumbrance of assets, entered April 2, 1990, be made permanent pending satisfaction of the judgment and be expanded to cover all banking institutions in which Thompson had funds.

8. Presented with evidence that Thompson had closed two bank accounts in violation of the court's restraining order, the district court also entered a new restraining order, which

Shortly thereafter, Thompson submitted a petition, which he later amended, seeking leave to appear as *amicus curiae* in the case of *Matthews v. Freedman*, Appeal No. 89-2112, then pending before this court. *Matthews* involved an appeal by Kramer of sanctions imposed on him by a district court in a matter unrelated to his litigation with Thompson. Thompson's petition contained renewed accusations that Kramer had "thrown" his case, was associated with the Yuppie Drug Ring, and generally was guilty of perjury, forgery, fraud, and extortion. In the petition, Thompson also repudiated the prior retraction letter that the district court had "forced" him to write. Thompson sent copies of his petition to the Disciplinary Board, U.S. Attorney's Office, F.B.I., I.R.S., and lawyers associated with the *Matthews* case.

Kramer filed a second motion to hold Thompson in contempt. This time, the district court declared Thompson in civil contempt of the permanent injunction, and ordered that he be confined and fined $500 per day until he purged himself of contempt by withdrawing all statements and court filings related to the *Matthews* case. Thompson then drafted, and the court edited and approved, the required letter of withdrawal. The court also ordered Thompson to advise the Clerk of this court, in regard to the instant appeal, that he had "admitted under oath in the trial of this matter that he defamed Steven Kramer and promised the jury, before verdict, that he apologized and would not in the future make such statements as were accused as defamatory by plaintiff."

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specifically prohibited Thompson from withdrawing the funds that he had withdrawn and redeposited at another bank. The court also awarded Kramer $2,550 in fees and costs associated with the contempt proceeding.

On August 24, 1990, the district court entered an expanded injunction prohibiting Thompson from contacting any person with whom Kramer conducts his business. Thompson filed a second notice of appeal with this court (No. 90-1640), which was consolidated with Thompson's pending appeal. We granted expedited argument, but refused Thompson's motion to stay enforcement of the injunction pending disposition of his appeal.[9] After hearing argument, however, we stayed enforcement of the injunction, pending that disposition.[10]

## II. DISCUSSION

Thompson appeals from a variety of orders of the district court, raising numerous allegations of error. We consider most of these in our companion memorandum opinion filed this day.[11] We will limit our inquiry in this opinion to the challenges to the permanent injunction entered by the district court

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9. Thompson may have continued to violate the permanent injunction even after the district court expanded it on August 24, 1990. On October 31, 1990, Kramer filed a third contempt motion with the district court, containing detailed allegations of further publications of the same libel, which the court agreed to hear on an expedited basis, scheduling a hearing for November 16. Thompson moved the district court to stay the hearing pending resolution of his appeal by this court. The district court initially refused, but ultimately acquiesced.

10. On June 14, 1991, after our remand to the district court on the diversity jurisdiction issue, *see supra* note 5, we stayed pending resolution of this appeal all execution proceedings and discovery in aid of execution relating to the $138,000 judgment against Thompson.

11. *See Kramer v. Thompson*, No. 90-1488, filed October __, 1991.

against Thompson after trial and to that injunction's subsequent enforcement and expansion.

As discussed above, this injunction essentially provided Kramer with two forms of equitable relief, in addition to the $138,000 in damages awarded by the jury. First, the court, threatening civil contempt, enjoined Thompson initially from issuing new statements of the type found libelous, and ultimately from contacting anyone with whom Kramer does business. Second, the injunction required Thompson to retract or withdraw various previously issued libelous statements and court filings. Thompson argues that the permanent injunction thus had the effect of "prohibiting and mandating" speech in violation of the First Amendment to the United States Constitution and Article I, section 7 of the Pennsylvania Constitution. We will consider separately Thompson's challenges to the prohibitory injunction and to the retraction order.

A. *Injunction Against Further Defamatory Statements*

It is axiomatic in this diversity case that the injunction cannot stand if it contravenes *either* the United States or Pennsylvania Constitutions. Because Thompson presses his claim principally by reference to the Pennsylvania Constitution, we will begin our analysis there. In light of our conclusion that the Pennsylvania Constitution does prohibit a judge from enjoing future libelous speech, we do not need to consider its federal analog.

Thompson relies primarily upon *Willing v. Mazzocone*, 482 Pa. 377, 393 A.2d 1155 (1978), which he argues is on all fours with the instant dispute, and which stands for the proposition that the Pennsylvania Constitution does not tolerate an injunction against libelous speech. Although we ultimately conclude that *Willing* differs in important respects from the instant dispute, the factual and legal contours of the two cases are sufficiently similar to merit a detailed comparison.

In 1968, defendant Helen Willing retained plaintiffs Carl Mazzocone and Charles Quinn, who practiced law together, to represent her in a worker's compensation claim. The two lawyers successfully obtained a settlement for Willing, from which she collected disability benefits for several years. In addition to their fee, Mazzocone and Quinn deducted $150 from the settlement as costs of the case. They claimed, and their records verified, that the money had been paid to one Dr. Robert DeSilverio, a psychiatrist who had been retained to testify on Willing's behalf.

At some point, for an unknown reason (and contrary to all available evidence), Willing came to believe that Mazzocone and Quinn had diverted for their own benefit $25 of the $150 allegedly paid to Dr. DeSilverio. For two days in 1975, Willing marched in protest in an area adjacent to the court buildings at City Hall in Philadelphia where the Court of Common Pleas, before which Mazzocone and Quinn practiced, was located. While marching, Willing wore a "sandwich-board" sign around her neck and on which she had written:

LAW-FIRM
of
QUINN-MAZZOCONE
*Stole money from me*—and
Sold-me-out-to-the
INSURANCE COMPANY

To attract attention while marching, Willing pushed a shopping cart bearing an American flag, continuously rang a cow bell, and blew on a whistle.

Mazzocone and Quinn attempted unsuccessfully to discourage Willing from further public protest. The two then filed a complaint in equity in the Court of Common Pleas of Philadelphia County seeking an injunction against further demonstration. The court found that there was no factual basis for Willing's defamatory protest, but noted that "either by reason of eccentricity or an even more serious mental instability," Willing could not be convinced that she had not been defrauded. 393 A.2d at 1157. The court enjoined Willing from further demonstration or picketing and from "carrying placards which contain defamatory and libelous statements and or uttering, publishing and declaring defamatory statements against [Mazzocone and Quinn]." *Id.*

On appeal, the Superior Court of Pennsylvania affirmed the injunction, although narrowing it somewhat so as to prohibit Willing only from "uttering or publishing statements to the effect that Mazzocone and Quinn, Attorneys-at-Law stole money from her and sold her out to the insurance company." *Mazzocone v. Willing*, 246 Pa. Super. 98, 369 A.2d 829, 834 (1976). In affirming the injunction, the Superior Court openly rejected the "traditional view that equity does not have the

power to enjoin the publication of defamatory matter." *Id.* at 831 (citations omitted).[12] The court noted that four reasons traditionally have been offered to justify equity's refusal to enjoin defamation:

> (1) equity will afford protection only to property rights; (2) an injunction would deprive the defendant of his right to a jury trial on the issue of the truth of the publication; (3) the plaintiff has an adequate remedy at law; and (4) an injunction would be unconstitutional as a prior restraint on freedom of expression.

369 A.2d at 831. The court then went on to state that "the logic and soundness of these reasons have been severely criticized by numerous commentators,"[13] and that "[o]ur own analysis

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12. The origin of this common-law precept is generally traced to Lord Eldon's *dicta* in *Gee v. Pritchard*, 2 Swans. 402, 36 Eng. Rep. 670 (1818), as adopted in the United States in *Brandreth v. Lance*, 8 Paige 24 (N.Y. Ch. 1839). These decisions reflected a distrust of equitable jurisdiction over libel, traceable, in part, to the Star Chamber which "once exercised the power of cutting off the ears, branding the foreheads, and slitting the noses of the libellers of important personages . . . and [which] was [also] . . . in the habit of restraining the publication of such libels by injunction." *Brandreth*, 8 Paige at 26. *See generally Kwass v. Kersey*, 139 W. Va. 497, 81 S.E.2d 237, 242 (1954) (reviewing rationale for evolution of common-law rule). As an outgrowth of *Gee* and *Brandreth*, libel plaintiffs in the United States generally have been limited to legal relief in the form of money damages.

13. The first assault on the common law's refusal to enjoin a defamation was led by Dean Roscoe Pound, *see* Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 Harv. L. Rev. 640 (1916), who apparently became so convinced of the wisdom and inevitability of abandoning the rule that he and Professor Chafee published a casebook detailing the emerging trend, *see* R. Pound and Z. Chafee,

compels us to conclude that blind application of the majority view to the instant case would be antithetical to equity's historic function of maintaining flexibility and accomplishing total justice whenever possible." 369 A.2d at 831. The court then reviewed each of the four traditional justifications.

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*Cases on Equitable Relief Against Defamation and Injuries to Personality* (1930). Pound's work has spawned a considerable body of literature over the years which has criticized the common-law rule, lamented the inadequacy of money damages as a remedy for defamation, and advocated a variety of alternative equitable remedies including declaratory judgment, right of reply, voluntary or mandatory retraction, injunction, and arbitration. *See generally* Long, *Equitable Jurisdiction to Protect Personal Rights*, 33 Yale L.J. 115 (1923); Chafee, *Possible New Remedies for Errors in the Press*, 60 Harv. L. Rev. 1 (1946); Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 Va. L. Rev. 867 (1948); Leflar, *Legal Remedies for Defamation*, 6 Ark. L. Rev. & B. Ass'n J. 423 (1952); Note, *Developments in the Law of Defamation*, 69 Harv. L. Rev. 875 (1956) [hereinafter Note, *Developments in Defamation*]; Note, *Developments in the Law of Injunctions*, 78 Harv. L. Rev. 994 (1965) [hereinafter Note, *Developments in Injunctions*]; Note, *Vindication of the Reputation of a Public Official*, 80 Harv. L. Rev. 1730 (1967); Bertelsman, *Injunctions Against Speech and Writing: A Re-Evaluation*, 59 Ky. L.J. 319 (1970); Note, *Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation*, 75 Colum. L. Rev. 963 (1975); Hulme, *Vindicating Reputation: An Alternative to Damages As a Remedy for Defamation*, 30 Am. U.L. Rev. 375 (1981); Gold, *Does Equity Still Lack Jurisdiction to Enjoin a Libel or Slander?*, 48 Brook. L. Rev. 231 (1982); Barron, *The Search for Media Accountability*, 19 Suffolk U.L. Rev. 789 (1985); Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 Cal. L. Rev. 809 (1986); Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in its Proper Place*, 101 Harv. L. Rev. 1287 (1988); Wissler, Bezanson, Cranberg & Soloski, *Why Current Libel Law Doesn't Work and What Judges Can Do About It*, 27 Judges' J. 29 (1988); and Dienes, *Libel Reform: An Appraisal*, 23 U. Mich. J.L. Ref. 1 (1989).

First, the court noted that the Pennsylvania Supreme Court had expressly repudiated the maxim that equity will protect property rights but not personal rights. *Id.* (citing *Everett v. Harron*, 380 Pa. 123, 110 A.2d 383 (1955)).[14] Pennsylvania apparently is now in line with the Restatement and the vast majority of other jurisdictions in this regard. *See Kenyon v. City of Chicopee*, 320 Mass. 528, 70 N.E.2d 241, 244 (1946); *see generally* Restatement (Second) of Torts § 937 comment (a) (1969); Gold, *supra* note 13, at 236-37; Note, *Developments in Injunctions*, *supra* note 13, at 998-1000. *But see Murphy v. Daytona Beach*

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14. The differential protection provided in equity for property and personal rights was a particular source of annoyance for Dean Pound:

> If a threatened tort involves injury to property for which the legal remedy is inadequate . . . preventive relief is normally available. But if an injury to personality is threatened, wholly destructive of plaintiff's dearest interest, we are told that his only recourse is the legal remedy of damages although no pecuniary measure can possibly be applied to the interest and no pecuniary standard to the wrong. May we give any reasons other than purely historical for a doctrine which at first blush is so arbitrary and unjust? Do the rules which our books still announce upon this subject rest upon any basis more legitimate than unintelligent adherence to the *dicta* of a great judge in the pioneer case? May we put this corner of the law in the order of reason by making the rules thereof conform to the general principle of concurrent jurisdiction where the legal remedy for a legal right is inadequate or by showing sound reason why, in this one spot, that general principle should not obtain?

Pound, *supra* note 13 at 640-41. *See also Murphy v. Daytona Beach Humane Society*, 176 So.2d 922, 926-27 (1978) (Wigginton, J., specially concurring) (expressing similar criticism).

*Humane Society*, 176 So.2d 922, 924 (1978) (denying injunction against defamation based on traditional view that equity will not protect rights of personality).

Second, the Superior Court reasoned that the argument that a defendant has a right to a jury determination as to the truth of a publication[15] "loses all persuasion . . . in those situations where the plaintiff has clearly established before a judicial tribunal that the matter sought to be enjoined is both defamatory and false." 369 A.2d at 831. Because there was no doubt that Willing's

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15. The notion of the right to a jury determination as to the libelous nature of speech apparently originated with Fox's Libel Act, 32 Geo. II, c. 60, § 1 (1792), which stated:

> On every such trial the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue . . . and shall not be required or directed by the Court or judge . . . to find the defendant . . . guilty merely on the proof of publication by such defendant . . . of the paper charged to be a libel. . . .

Prior to Fox's Act, English judges had determined whether a particular statement was libelous; the jury merely determined whether there had been publication of the statement. *See* Leflar, *supra* note 13, at 434 n.37. Fox's Act thus expanded the jury's role, a development which was transplanted to America when many of the states subsequently patterned their respective constitutional and statutory provisions governing libel upon the Act, *see* Note, *Developments in Defamation*, *supra* note 13, at 944. Since this time, numerous courts have referred to the right to a jury trial in denying injunctions against defamation, generally reasoning that the jury provides a safeguard against judicial censorship of speech. *See Schmoldt v. Oakley*, 390 P.2d 882, 886 (Okl. 1964). *See generally* Annotation, *Injunction as Remedy Against Defamation of Person*, 47 A.L.R.2d 715, 727-28 [§ 5b] (1956) (citing cases).

sign was both false and malicious, the Superior Court reasoned that "[t]o refuse injunctive relief under the circumstances of this case on the grounds that defendant would be denied a jury trial is to elevate form over substance." *Id.* 832.

Third, the Superior Court challenged the precept that plaintiffs do not need equitable relief because they have an adequate remedy at law for damages.[16] In particular, the Superior Court reasoned that Mazzocone and Quinn did *not* have an adequate remedy at law because: (1) the value of their professional and personal reputations, and the diminution in that value resulting from Willing's libel, were difficult to prove and measure; (2) given Willing's apparent mental instability, it was reasonable to assume that she would continue to libel the plaintiffs necessitating a multiplicity of damage actions on their behalf; and (3) Willing was indigent, rendering any action for damages a

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16. This precept is also of considerable vintage:

> The adequate remedy rule well reflected Chancery's subordinate position as it developed in medieval England against the background of the established courts of law. Equity was a "gloss" on the law; its sole justification for assuming jurisdiction was that traditional legal remedies and procedures could not offer the plaintiff satisfactory relief.

Note, *Developments in Injunctions*, *supra* note 13, at 997 (citations omitted). Although law and equity have been merged in most jurisdictions, the adequate remedy rule continues to be cited frequently as a ground for denying injunctive relief against defamation. *See Alberti v. Cruise*, 383 F.2d 268 (4th Cir. 1967); Annotation, *Injunction as Remedy Against Defamation of Person*, 47 A.L.R.2d 715, 724-25 [§ 4a] (1956) (and cases cited therein).

"pointless gesture" in any event.[17] 369 A.2d at 832. In light of these factors, the Superior Court concluded that Mazzocone and Quinn did not have an adequate remedy at law.

Fourth, although the Superior Court acknowledged that the argument that an injunction against defamation is an unconstitutional prior restraint on free expression[18] "is by far the most cogent of all the

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17. The adequate remedy at law rationale for denying injunctions against defamations has been rejected or criticized in numerous reported decisions and in the literature. *See generally Dino de Laurentiis Cinematografica, S.P.A. v. D-150, Inc.*, 366 F.2d 373, 375-76 (2d Cir. 1966); *Menhard v. House*, 298 Mass. 540, 11 N.E.2d 436, 437 (1937); *Murphy*, 176 So.2d at 927 (Wigginton, J. specially concurring); Note, *Developments in Injunctions*, *supra* note 13, at 1000-04; Bertelsman, *supra* note 13, at 320; Gold, *supra* note 13, at 262; These cases and articles generally adopt the modern view, reflected in the Restatement (Second) of Torts § 936 (1969), that the availability of legal remedies is merely one of the factors to be considered in determining the appropriateness of an injunction against a threatened tort.

18. The abhorrence of prior or previous restraints on speech apparently was imported into American legal lore from Blackstone:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous restraints* upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievious or illegal, he must take the consequences of his own temerity.

W. Blackstone, *Commentaries* §§ 151-52 (emphasis added).

reasons offered in support of the traditional view."[19] It reasoned that not all restrictions on speech constitute prior restraints. 369 A.2d at 832. Invoking Justice Frankfurter's opinion in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441-42, (1957), the court maintained instead that "a pragmatic and modern rather than a theoretical and historical approach" should be employed in determining what constitutes a prior restraint. 369 A.2d at 832-33. As explicated by the Superior

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Blackstone wrote primarily in reference to the English licensing system of the seventeenth century, under which "nothing could be printed without prior approval from the state or church authority." Gold, *supra* note 13, at 245.

19. *See Konigsberg v. Time, Inc.*, 288 F. Supp. 989 (S.D.N.Y. 1968) ("To enjoin any publication, no matter how libelous, would be repugnant to the First Amendment to the Constitution."); *Krebiozan Research Foundation v. Beacon Press, Inc.*, 334 Mass. 86, 93, 134 N.E.2d 1, 6 (1956) ("[T]he constitutional protection of free speech and public interest in the discussion of many issues greatly limit the areas in which the power to grant injunctive relief may or should be exercised in defamatory cases."); *Northwestern Pac. R. Co. v. Lumber & Sawmill Workers' Union*, 31 Cal.2d 441, 189 P.2d 277, 282 (1948) ("[Equity] will not restrain the commission of a libel or slander, for that is prior censorship — a basic evil denounced by the constitutions of the United States and California in protecting freedom of speech and press."). *See generally* Annotation, *Injunction as Remedy Against Defamation of Person*, 47 A.L.R.2d 715, 726-27 (1956) ("The most formidable obstacle to the grant of injunctive relief against personal defamation in this country has been the feeling of the courts that to allow such relief would infringe the constitutionally guaranteed freedoms of speech and of the press by setting up what would be, at least potentially, a system of judicial censorship."); Bertelsman, *supra* note 13 at 323 ("[T]he constitutional problem of prior restraint . . . has proved to be the most formidable obstacle to the granting of injunctive relief in cases involving speech or writing.").

Court, this pragmatic approach should attempt to weigh, on a case-by-case basis, the likelihood that the alleged defamatory statements were true, the magnitude of the harm done to the plaintiff if the speech is not restrained, the adequacy of legal remedies, and, most importantly, whether the public interest will be disserved by suppressing the speech. *Id.* at 833-34 (citations omitted). Under this pragmatic approach, the court concluded, the injunction against Willing should not be considered an unconstitutional prior restraint.

> In the case at bar, we perceive no public interest so substantial or significant as to permit defendant's continuing false accusations concerning plaintiff's professional conduct. On the other hand, the injury to plaintiff's reputation can be extensive and irreparable if the defendant is permitted to continue her activities. Under these circumstances, the court below properly granted the injunction.

*Id.* at 834.

The Supreme Court of Pennsylvania reversed, essentially refuting the reasoning of the Superior Court on two grounds. 482 Pa. 377, 393 A.2d 1155 (1978). First, invoking Blackstone and referencing the pernicious English Licensing Acts, *see supra* note 18, the Supreme Court noted that the Commonwealth of Pennsylvania long has rejected any prior restraint on the exercise of speech as reflected in Article I, section 7 of the Pennsylvania Constitution[20] and in the Court's own decision in

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20. Article I, section 7 provides in pertinent part:

> The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen

*Goldman Theatres v. Dana*, 405 Pa. 83, 173 A.2d 59, *cert. denied*, 368 U.S. 897 (1961).[21]

Second, the Supreme Court addressed the Superior Court's argument that Mazzocone and Quinn did not have an adequate remedy at law because Willing was indigent and unable to satisfy a damages action. In unequivocal terms, the Supreme Court stated that Willing's constitutional rights should not be contingent upon her financial status.

> We cannot accept the Superior Court's conclusion that the exercise of the constitutional right to freely express one's opinion should be conditioned upon the economic status of the individual asserting that right. Conditioning the right of free speech upon the monetary worth of an individual is inconsistent not only with fundamental principles of justice developed by the Supreme Court of the United States and guaranteed by the Federal Constitution, but also violates our own constitution's express admonitions that "[a]ll men are born equally free and independent, and have certain inherent and

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> may freely speak, write and print on any subject, being responsible for the abuse of that liberty.
>
> Pa. Const., Article I, section 7 (Purdon 1969).

21. In *Goldman*, the Pennsylvania Supreme Court declared unconstitutional the Motion Picture Control Act of 1959, which had empowered the governor to appoint a board of three censors who had the authority to ban the showing, under threat of prosecution, of any motion picture that they considered to be obscene. The Court struck down the Act as a prior restraint on speech in violation of Article I, section 7 of the Pennsylvania Constitution, and as an infringement of the right to trial by jury under Article I, sections 6 and 9 thereof.

> indefeasible rights . . .", and that "[n]either the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."

*Id.* at 1158 (citations omitted).

The Supreme Court added that, as a matter of common-law precedent, the Superior Court had been wrong in assuming that Willing's indigency in any way was relevant to determining whether Mazzocone and Quinn had an adequate remedy at law.

> In Pennsylvania the insolvency of a defendant does not create a situation where there is no adequate remedy at law. In deciding whether a remedy is adequate, it is the remedy itself, and not its possible lack of success that is the determining factor. "The fact, if it be so, that this remedy may not be successful in realizing the fruits of recovery at law, on account of the insolvency of the defendants, is not of itself or [sic] ground of equitable inference."

*Id.* (citations omitted).

Justice Roberts's concurrence in *Willing* reiterated the majority's rationale that Mazzocone and Quinn had an adequate remedy at law, notwithstanding Willing's insolvency. *Id.* at 1159. His concurrence also argued, by reference to relevant United States Supreme Court precedents,[22] that the injunction issued against Willing constituted a classic prior restraint on

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22. *See Near v. Minnesota*, 283 U.S. 697 (1931); *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175 (1968); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *New York Times Co. v. United States*, 403 U.S. 713 (1971).

speech in violation of both the Pennsylvania and United States Constitutions. *Id.* Justice Roberts also expanded upon the majority's analysis, and refuted another of the Superior Court's rationales for upholding the injunction, arguing that the injunction violated Willing's right to trial by jury.

> As a consequence of holding that the defendant's indigency creates equitable jurisdiction, the Superior Court conditions appellant's right to trial by jury on her economic status. One of the underlying justifications for equity's traditional refusal to enjoin defamatory speech is that in equity all questions of fact are resolved by the trial court, rather than the jury. Thus, it deprives appellant of her right to a jury trial on the issue of the truth or falsity of her speech. The right to trial by jury is more than mere form. Indeed the right to a jury trial is guaranteed by this Commonwealth's Constitution.

*Id.* (citations omitted).

In short, *Willing* may be summarized as follows. The Superior Court was presented with a case which, in its view and that of many of the commentators, cried out for reexamining the common-law precept that equity will not enjoin a defamation. The Superior Court, after carefully considering each of the traditional justifications for the precept, found one no longer viable and the remaining three unpersuasive given the certainty that Willing's statements were false, the likelihood that she would continue to issue libelous statements, her inability to satisfy a damages judgment, and the fact that the public had little interest in the speech at issue. The Supreme

Court, however, stood firmly behind the traditional bar to equitable relief, holding essentially that Willing's constitutional rights to uncensored speech and trial by jury were paramount even though, as a practical matter, she would be immune to a damages action after the speech were issued.[23]

Given the similarities between *Willing* and the instant dispute, and the Pennsylvania Supreme Court's flat rejection of the Superior Court's avoidance of the traditional rule against enjoining defamation, it arguably would be appropriate to overturn the district court's injunction against Thompson without further elaboration. We believe, however, contrary to Thompson's assertions, that there is a material difference between the two cases that makes further analysis unavoidable.

As noted previously, *Willing* originated when Mazzocone and Quinn filed a suit in equity in the Court of Common Pleas of Philadelphia seeking to enjoin Willing's defamatory protest. The two lawyers never sought damages, nor did a jury ever pass upon the veracity of Willing's statements. The Common Pleas judge, satisfied that the statements obviously lacked foundation and that Willing was mentally imbalanced, issued the injunction based entirely upon his view of the situation and his equitable powers. Thompson, by contrast, was enjoined from further defamatory speech as an

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23. We have found no relevant cases decided by the Pennsylvania Supreme Court since *Willing*. The Superior Court, however, has twice overturned injunctions against defamation on the authority of *Willing*. *See Johnson v. Pilgrim Mutual Ins. Co.*, 59 Pa. Commw. Super. 55, 425 A.2d 1115 (1981); *Franklin Chalfont Assoc. v. Kaltkow*, 392 Pa. Super. 452, 573 A.2d 550 (1990).

adjunct to Kramer's successful action at law for damages. Because the district court directed a verdict in Kramer's favor on the issue of liability, leaving to the jury only the issue of damages, we recognize that it is not entirely accurate to state that Thompson was afforded a jury determination as to the veracity of his statements. However, since the directed verdict is functionally equivalent to a jury award, at least in theory Thompson's comments were found to be libelous after a full and fair jury trial.[24]

The existence of a jury trial is a potentially crucial distinction between *Willing* and this case. Two of the three traditional reasons for barring equity from enjoining a defamation, as rescribed by the Pennsylvania Supreme Court in *Willing*, are obviated once a jury has determined that the enjoined statements are indeed libelous. First, it obviously cannot be said that a defendant has been denied the right to a jury determination of the veracity of his statements if a judge issues an injunction against further statements *after* a jury has determined that the same statements are untrue and libelous. Second, not all injunctions against speech constitute prior restraints. The United States Supreme Court has held repeatedly that an injunction against speech generally will not be considered an unconstitutional prior restraint if it is issued after a jury has determined that the speech is not constitutionally protected. *See, e.g., Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rel.*, 413 U.S. 376, 390 (1973) ("The special vice of a prior restraint is that

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24. We elaborate on the ramifications of a directed verdict in this context, *infra* at _____.)

communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment."). [25] The Pennsylvania cases appear to be in accord. [20] Because libelous speech is not protected by either

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25. *Pittsburgh Press* is but one in a series of Supreme Court decisions, written since the landmark prior restraint decision in *Near v. Minnesota*, 283 U.S. 697 (1931), which have held that an injunction against speech is not a prior restraint if issued in conjunction with well-defined procedural guidelines to ensure against governmental censorship of protected speech. *See Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175 (1968); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). Although these cases differ somewhat over the extent of procedural safeguards necessary to avoid a charge of prior restraint, they all appear to agree that a full jury determination as to the protected status of speech is adequate to support the issuance of an injunction.

20. *See, e.g., Brightbill v. Rigo, Inc.*, ___ Pa. Super. ___, 418 A.2d 424 (1980), involving an enforcement action by the district attorney of Lebanon County under the Pennsylvania Obscenity Statute. After a jury trial at which fifteen magazines and five movies previously sold by the defendant, the owner of an adult book store, had been determined by a jury to be obscene, the prosecutor obtained an order from the trial court enjoining the defendant from selling or exhibiting any "like or similar" materials. The Superior Court reversed the injunction, holding that the sale of particular magazines and movies could be enjoined, but only after a specific determination by a jury that each was obscene. *See also William Goldman Theatres, Inc. v. Dana*, ___ Pa. ___, 173 A.2d 59, 65 (1961) ("[O]nce accused cannot constitutionally be punished for the utterance of alleged obscene matter except upon a finding by an impartial jury of the vicinage that the matter was in fact obscene. . . .").

the United States or the Pennsylvania Constitutions, *see Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 387 (1974) (White, J., dissenting); *Commonwealth v. Acquaviva*, 187 Pa. Super. 550, 145 A.2d 407, 411 (1958) (*per curiam*); *Commonwealth v. King*, 33 D. & C. 2d 235, 238 (1963), it follows that, once a jury has determined that a certain statement is libelous, it is not a prior restraint for the court to enjoin the defendant from repeating that statement.

Mindful of our responsibility to predict how the Pennsylvania Supreme Court would decide this case under its laws and Constitution, the case appears to be reducible to the following question: Would the Pennsylvania Supreme Court have upheld the injunction against Willing if Mazzocone and Quinn had first obtained a jury determination that her statements were libelous? Stated more broadly, would the Pennsylvania Supreme Court be willing to permit an exception to the rule that equity will not enjoin a defamation in cases where there already has been a jury determination that the defendant's statements were libelous?

Although this is apparently a question of first impression under Pennsylvania law, it has been considered in other jurisdictions. To begin with, our research reveals four Missouri cases that suggest in *dicta* that an injunction can issue against further publication of defamatory statements once the plaintiff had secured a jury verdict. *See Flint v. Hutchinson Smoke Burner Co.*, 110 Mo. 492, 19 S.W. 804, 806 (1892); *Wolf v. Harris*, 267 Mo. 405, 184 S.W. 1139, 1141-42 (1916); *Ryan v. Warrensburg*, 342 Mo. 761, 117 S.W.2d 303, 308 (1938); *Downey v. United Weather*

*Proofing Inc.*, 363 Mo. 852, 253 S.W.2d 976, 983 (1953). On the strength of these cases, an A.L.R.2d Annotation, published in 1956, observed:

> It may be argued that the constitutionally guaranteed rights of free speech and trial by jury are not infringed by equitable interference with the right of publication where the defamatory nature of the publications complained of has once been established by a trial at law, and the plaintiff seeks to restrain further similar statements.

Annotation, *Injunction as Remedy Against Defamation of Person*, 47 A.L.R.2d 715, 728 (1956).

This point was more strongly stated in an Am. Jur. entry in 1969, again relying solely on the Missouri cases and the A.L.R.2d Annotation:

> After a plaintiff has, by a judgment at law, established the fact that certain published statements are libelous, he may, on a proper showing, have an injunction to restrain any further publication of the same or similar statements.

42 Am. Jur. 2d *Injunctions* § 135, at 892 (1969).[27]

In 1975, the Supreme Courts of Ohio and

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27. Interestingly, Judge Jacobs's dissent from the Superior Court's affirmance of the injunction in *Willing*, while bemoaning the majority's abandonment of the traditional rule that equity will not enjoin a defamation, quoted this Am. Jur. passage as an example of accepted exceptions to the general rule. *See Willing*, 369 A.2d at 836. Although the Supreme Court of Pennsylvania ultimately adopted much of Judge Jacobs's reasoning supporting the view that the traditional rule should apply, at least on the facts of that case, the Court never stated whether it concurred in his view concerning this exception.

Georgia became the first courts clearly to adopt this exception to the general rule that equity will not enjoin a defamation. See *O'Brien v. University Community Tenants Union*, 42 Ohio St. 2d 242, 327 N.E.2d 753 (1975); *Retail Credit Co. v. Russell*, 234 Ga. 765, 218 S.E.2d 54 (1975). *O'Brien* was instituted by a landlord who claimed that he was being defamed and blacklisted by a tenants' group. The landlord secured a jury determination that certain statements were libelous and then sought and obtained an injunction against further libel. The Supreme Court of Ohio affirmed the injunction stating:

> Once speech has judicially been found libelous, if all the requirements for injunctive relief are met, an injunction for restraint of continued publication of that same speech may be proper. The judicial determination that specific speech is defamatory must be made prior to any restraint.

327 N.E.2d at 756.

In *Retail Credit*, the plaintiff, the subject of a credit report containing statements adjudged libelous by a jury, obtained a permanent injunction prohibiting the defendant from republishing the libelous statements. The Georgia Supreme Court, relying largely on the United States Supreme Court's opinion in *Pittsburgh Press*, *see supra* at ___, upheld the injunction on the ground that the injunction was not a prior restraint because "prior to the issuance of the injunction 'an adequate determination [was made] that it is unprotected by the First Amendment.'" 218 S.E.2d at 63.

Nearly a decade later, the Minnesota Supreme Court followed suit in *Advanced Training Systems*

*v. Caswell Equipment Co.*, 352 N.W.2d 1 (Minn. 1984). That Court held:

> A judicial tribunal has, after full adversarial proceedings, found that defendant's criticism of [plaintiff's] equipment constituted 'false or misleading' product disparagement. . . . Other courts have also upheld the suppression of libel, so long as the suppression is limited to the precise statements found libelous *after* a full and fair adversary proceeding. We therefore hold that the injunction below, limited as it is to material found either libelous or disparaging after a full jury trial, is not unconstitutional and may stand.

352 N.W.2d at 11 (citations omitted).

We find the reasoning and policies undergirding these cases quite persuasive. But that is not dispositive here. Our function is to look, as best we can, into the minds of the members of the Pennsylvania Supreme Court, and to ascertain their likely disposition of this case. Although the prediction is difficult, the available evidence leads us to the conclusion that the Pennsylvania Supreme Court would overturn the injunction against prospective libel issued by the district court against Thompson. In reaching this conclusion, we are persuaded by five factors.

First, the maxim that equity will not enjoin a libel has enjoyed nearly two centuries of widespread acceptance at common law. The welter of academic and judicial criticism of the last seventy years has, in truth, done little more than chip away at its edges. In any event, as evidenced by the Pennsylvania Supreme Court's unqualified rejection of the Superior Court's "modern" view in *Willing*, Pennsylvania would appear firmly bound

to the traditional rule. This may well be due to the extraordinary reverence and solicitude with which the Commonwealth of Pennsylvania has viewed the right of free expression, tracing back to the experiences in England of its founder William Penn[28] and carried forward in the Commonwealth's various Constitutions.[29] This

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28. Penn was jailed several times for the expression of his views while still in England. In the most famous of these incidents, Penn and a compatriot, William Mead, were arrested in 1670 for addressing an unlawful assembly of Quakers in Grace Church Street after the crown had ordered their meeting house locked. The two were tried in London before a jury, which, to the great displeasure of the court, found that the defendants had spoken in the street but that they were not guilty of any criminal offense. Unable to persuade the jury, notably one particularly obstinate juror named Bushell, to reconsider its verdict, the court ordered that the jurors themselves be fined and imprisoned for two days. The jurors were released on writ of habeas corpus after the Chief Justice of the Court of Common Pleas held, in the landmark *Bushell's Case*, 124 Eng. Rep. 999, 1006 (Vaughan 1670), that a court may not order a jury to reach a criminal verdict against its convictions. *See The Trial of William Penn*, 6 Litigation 35 (Winter 1980); *see also Commonwealth v. Contakos*, 499 Pa. 340, 453 A.2d 578, 580-82 (1982) (noting, *inter alia*, the relationship between the trial of Penn and the importance ascribed to the openness of trials in Pennsylvania).

29. Since the founding of the Commonwealth, Pennsylvania's Constitutions have clearly provided for individual rights to freedom of speech and of the press. The original Constitution of the Commonwealth of Pennsylvania, adopted in 1776, contained a Declaration of the Rights of the Inhabitants of the State of Pennsylvania, clause XII of which stated:

> That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained. Pa. Const. of 1776, cl. XII.

adherence to the common law also may reflect that Pennsylvania's jurisprudence is wedded to preserving limitations on equitable relief that are elsewhere out of date. Whatever the reason, the fact remains that the Supreme Court of Pennsylvania appears entirely comfortable with the common-law bar; hence, we must tread lightly and carefully before recognizing an exception to this general rule in a diversity case turning on Pennsylvania law.

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Section 35 of the Constitution of 1776 further stated:

> The printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government. *Id.*, cl. 35.

These two provisions were merged and expanded in Article IX, section 7 of the Constitutions of 1790, which stated in pertinent part:

> The printing-presses shall be free to every person who undertakes to examine the proceedings of the legislature or any branch of government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. . . .

With very minor alterations, that language was readopted in Article IX, section 7 of the Constitution of 1838, and Article I, section 7 of the current Constitution of 1874. It is noteable that these provisions are far more expansive than the First Amendment to the United States Constitution which is stated solely in negative terms, i.e., that "Congress shall make no law . . . abridging the freedom of speech . . . ." We note additionally that, in the view of at least one Pennsylvania trial court, Article I, section 7, of the Pennsylvania Constitution does prohibit injunctive relief against defamation, *see Frick v. Stevens*, 43 Pa. D. & C.2d 6, 34-36 (1967).

Second, although an exception to the general rule has been recognized in several cases where there has been a jury determination of the libelous nature of specific statements, we would do well not to overstate the degree of acceptance that has been accorded to this exception. For the better part of this century, this exception existed, as best we can determine, only in Missouri, and there based entirely on a single line of *dicta*. That three state supreme courts have affirmatively adopted the exception in the last two decades may represent the trickle that presages the collapse of the common-law dam. But, for now, it remains a trickle. And as far as we can tell, the Pennsylvania Supreme Court is more likely to plug the holes in the dam than to contribute to its destruction.

Third, even if we thought that the Pennsylvania Supreme Court might be inclined to adopt the jury determination exception, we doubt that this is the case in which it would do so. The district court in this case took the decidedly unusual step of directing a verdict on the issue of liability against Thompson before he put on a defense, finding that the statements were so patently libelous that no justification or defense could possibly exist. In theory, of course, a directed verdict at law is tantamount to a jury verdict. From the defendant's perspective, however, a directed verdict is indistinguishable from the decree of a court sitting in equity. Given the fear of judicial censorship that has pervaded this area of jurisprudence, and the almost talismanic significance that the case law attaches to the decisions of juries, we think it likely that, even if the Pennsylvania Supreme Court were willing to adopt this exception, it would do so only when there *actually* has been a jury

determination regarding the libelous nature of the defendant's statements.[30]

Fourth, and perhaps most importantly, we believe that the Pennsylvania Supreme Court would not adopt the jury determination exception if confronted with this case because, as *Willing* pointedly suggests, that Court continues to place great emphasis on the adequate remedy doctrine as a bar to equitable relief. Indeed, even a jury determination that particular statements are libelous does not address the traditional notion that equity should not intervene where legal remedies (i.e., damages) are adequate, either in practice or even just in theory. Although we find the Superior Court's reasoning quite persuasive, and while at least one commentator has taken the Pennsylvania Supreme Court to task for its adherence to what he views as the outdated adequate remedy rule in *Willing*,[31] that court's decision in *Willing*, we believe, quite clearly reflects its continuing adherence to the adequate remedy rationale for denying injunctive relief.

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30. We note in this regard that, consistent with Fox's Act, discussed *supra* note 15, the last clause of Article I, section 7, of the Pennsylvania Constitution states that "in all indictments for libels *the jury* shall have the right to determine the law and the facts, under the direction of the court, as in other cases." (Emphasis added.)

31. *See* Gold, *supra* note 13, at 243 n.46:

> The Pennsylvania Supreme Court declared that in determining the adequacy of a legal remedy, the existence of the remedy itself is dispositive, and not whether it is likely to succeed. In support of this conclusion, the Pennsylvania court cited *Bersch v. Rust*, 249 Pa. 512, 95 A. 108 (1915) and *Hellman v. Union Coal Co.*, 37 Pa. 100 (1860). Plainly, when these

Whether or not that Court would have felt less passionately about the adequate remedy rule had it been satisfied that the rights to trial by jury and free speech were not also implicated is difficult to discern. In the end, we can do no more than take the *Willing* Court's words at face value. From our reading, we must conclude, on balance, that the Court was sufficiently transfixed by brooding emanations from Pennsylvania's history and the various constitutional provisions pertaining to free speech, and was sufficiently concerned about the encroachment of equity upon legal remedies, and in particular about the selective invocation of equitable remedies against indigent defendants, that it would have denied an injunction even on the facts of this case.

Fifth and finally, we note that this case presents a stronger case than *Willing* for denying equitable relief. Unlike Willing, there has been no showing that Thompson is indigent (the record suggests that he is moderately affluent), or that the threat

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> two cases were decided, careful distinctions between courts of law and equity were still being observed. As these distinctions are no longer relevant today, the validity of the Pennsylvania court's analysis becomes questionable. . . .
>
> Gold continued:
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> [N]otwithstanding the manifest inadequacy of the legal remedy . . ., the Pennsylvania court refused to provide the limited equitable protection sought by the plaintiff. Ironically, then, this formalistic reliance on an age-old equitable maxim, rather than doing justice, deprived the plaintiffs of all forms of redress and permitted the defendant to continue to act with impunity.

*Id.* at n. 243.

of future damages is inadequate to deter him or to compensate Kramer. Therefore, even under the liberal standards for granting equitable relief urged by the Superior Court in *Willing*, 393 A.2d at 1158, an injunction probably would be inappropriate in this case.[32] And certainly, given the Pennsylvania

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32. *See, e.g., Greenberg v. De Salvo*, 229 So. 2d 83 (1969). That case involved a defamed lawyer and very much resembled the instant dispute. Greenberg obtained a jury verdict for damages, establishing that De Salvo's statements that he was "a crook," "a crooked lawyer," and "a slimy kike," were libelous. The trial court also issued a permanent injunction barring De Salvo from repeating these statements. The Supreme Court of Louisiana overturned the injunction stating that the "[t]he writ of injunction, being a harsh, drastic, and extraordinary remedy, should issue only where the party seeking same is threatened with irreparable loss or injury without adequate remedy at law." 229 So. 2d at 86. Unlike the Pennsylvania Supreme Court in *Willing*, the Louisiana Supreme Court did not assume that the mere theoretical availability of damages constituted adequate relief. The Court appeared willing to uphold Greenberg's injunction if he could show that damages were indeed inadequate. However, after reviewing the record, the Court concluded that:

> [Greenberg] has not proved an immediate threat of a multiplicity of suits; he has not proved that he has no legal remedy; he has not proved a conspiracy or coercion. [He] has not proved that [the defendant] is insolvent; he has not proved that she will be unable to respond in damages if in the future they are assessed against her. . . . [He] has not proved that he will suffer irreparable injury, loss, or damage. Under such findings, we conclude that this is not a matter for the administration of equity. [Greenberg] has not made a proper showing that this matter justifies the issuance of the harsh remedy of injunction. [He] has an adequate remedy at law if in the future he feels he is suffering from slander and libel allegedly committed by [the defendant].

229 So. 2d at 88.

Supreme Court's rigid adherence to the traditional adequate remedy rule, Kramer's prospects for securing an injunction from that Court seem slim.

For the foregoing reasons, we will reverse those portions of the district court's orders that enjoined Thompson from repeating the statements deemed libelous and from communicating with anyone doing business with Kramer.

B. *Mandatory Retraction and Withdrawal of Prior Statements and Court Filings*

We need not tarry very long over those portions of the district court's orders that sought to force Thompson to write letters of retraction to recipients of prior libelous statements and to withdraw libelous court filings. We have reviewed the available literature and reported decisions. Although the notion of *compelled* retraction occasionally has been advanced in the literature,[33] we have not found a single case in which such a remedy has been awarded.

Many states have enacted statutes that provide for the mitigation of compensatory or punitive damages in cases where a libel defendant, typically a newspaper, *voluntarily* retracts prior to trial. *See Taylor v. Hearst*, 107 Cal. 262, 40 P. 392 (1895); Leflar, *supra* note 13, at 436-41; Note, *Developments in Defamation*, *supra* note 13, at 940-42. No statutes to our knowledge, however, *compel* retraction. The reasons for the reluctance of state legislatures and courts to provide for

33. *See* Leflar, *supra* note 13, at 440-41; Chafee, *supra* note 13, at 26; Note, *Vindication of the Reputation of a Public Official*, 80 Harv. L. Rev. 1730, 1739-43 (1967); Note, *Developments in Defamation*, *supra* note 13, at 940.

mandatory retraction are apparent enough. As one commentator has stated:

> None of the statutes provide for a compulsory retraction . . .; they all leave it up to the defamer as to whether he will retract, even after formal demand from the defamed person. Retraction is a defense, not an award in the plaintiff's favor.
>
> Compulsory retraction has obvious defects. The sincerity of a compelled retraction may be doubted, and by reason of that fact it may fall short of achieving real vindication for the defamed person. Third persons may feel that the defamer is merely saying what the law requires him to say without changing his true opinion.

*See* Leflar, *supra* note 13 at 440.[34]

This is not to suggest that policy reasons alone have discouraged legislatures and courts from invoking this remedy. Commentators have raised a serious question, related to the prior discussion of prospective injunctions but as yet substantially

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34. Another commentator similarly has observed:

> A full retraction by the defamer, given the same publicity as the original publication, is probably the best means of restoring the plaintiff's reputation. Although it has been argued that a court could, after a judgment of liability or guilt, use its contempt powers to force a retraction, this technique has not been utilized in the United States, possibly because of judicial reluctance to force an individual to make statements contrary to his convictions. Moreover, a voluntary retraction appears better suited to undo the harm since a retraction forced by a court is less likely to convey the impression that the defendant sincerely believes his prior statements to be untrue.

Note, *Developments in Defamation*, *supra* note 13, at 940.

less debated, whether compelled retraction could withstand first amendment scrutiny. For example, Professor Chafee has written:

> Since courts often base their refusal of injunctions in libel cases on the constitutional right of free speech, it is doubtful whether even a statute could make compulsory retraction valid. . . . [I]t may very well be a serious invasion of liberty of the press to compel a newspaper to publish as true what the editor believes to be false. And that is what a retraction is, if the editor persists in thinking his supposed libel correct.

Chafee, *supra* note 13, at 26. *See also* Hulme, *supra* note 13, at 387-88 ("Although retraction may provide a quick and efficient remedy, the availability of this remedy depends entirely upon the defendant's cooperation; he cannot legally be compelled to issue a retraction.").

To our knowledge, the only two cases that even remotely come close to addressing mandatory retraction are *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), and *Coughlin v. Westinghouse Broadcasting and Cable, Inc.*, 689 F. Supp. 483 (E.D. Pa. 1988). In *Miami Herald*, the Supreme Court was called upon to assess the constitutionality of a Florida statute that provided a so-called "right of reply" to political candidates whose personal or official records were assailed by the media. Under the statute, newspapers were required to print, free of cost to the candidate, and subject to punishment if they refused, any reply that a candidate wished to make to the newspapers' charges. The Court declared the statute unconstitutional stating:

> [T]he Court has expressed sensitivity as to whether a retraction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that no such compulsion to publish that which "'reason' tells them should not be published" is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues cannot be legislated.

*Miami Herald*, 418 U.S. at 256 (citations omitted).

A "right of reply" differs from a mandatory retraction in that the former merely requires the defamer to provide space for a reply, whereas the latter requires the defamer to mouth or pen the words the plaintiff would have him say. As such, the unconstitutionality of compelled retraction would seem to follow *a fortiori* from the Court's declaration that Florida's "right of reply" statute is unconstitutional. One might draw such an inference from *Miami Herald* were it not for the short and curious concurrence authored by Justice Brennan:

> I join the Court's opinion which, as I understand it, addresses only "right of reply" statutes and implies no view upon the constitutionality of "retraction" statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction. *See generally* Note, *Vindication of the Reputation of a Public Official*, 80 Harv. L. Rev. 1730, 1739-1747 (1967).

*Id.* at 258-59 (Brennan, J. concurring). It is therefore difficult to know what to make of *Miami Herald* for purposes of our current inquiry.

*Coughlin* is also somewhat related to our inquiry. There, a policeman, who claimed that he had been defamed by a television station, wrote the management of the station demanding retraction, but was rebuffed. Apparently unable to prove that the statements had been made with sufficient recklessness to support a typical damages action for libel, the policeman sought damages invoking the novel theory that the station had breached a common-law duty under Pennsylvania law to retract what it later knew to be false. The television station opposed the claim, arguing that such a cause of action would amount to mandatory retraction. The station argued that the Pennsylvania Supreme Court would not create such a cause of action, because it would contravene principles inhering in the first amendment, "which preclude giving directions to anybody as to what to publish." *Coughlin*, 689 F. Supp. at 489.

Judge Pollak reviewed the authorities speaking to the constitutionality of mandatory retraction, focusing on *Miami Herald* and the apparent conflict between the majority opinion and Justice Brennan's concurrence. He concluded, in *dicta*, that "[m]y view of the matter is that a carefully crafted retraction statute could well be constitutional." *Id.* at 489. Judge Pollak denied the plaintiff's claim, however, concluding that even if mandatory retraction would survive constitutional scrutiny, such a cause of action properly should originate with the Pennsylvania legislature, not the courts. *Id.* at 90. We agree.

In sum, we find no support for the various retractions and withdrawals forced upon Thompson by the district court. Consequently, those orders of the district court compelling such retractions and withdrawals, and the associated contempt citations, must be reversed.[35]

## III. CONCLUSION

For the foregoing reasons, we will reverse those portions of the orders of the district court, entered April 6, June 5, June 12, July 31, August 1, and August 24, 1990, that permanently enjoined defendant from uttering libelous statements, mandated the retraction or withdrawal of past libelous statements, held defendant in civil contempt, and awarded plaintiff attorney's fees arising out of contempt proceedings. For the reasons stated in our companion memorandum opinion filed this day, *Kramer v. Thompson*, the judgment awarding damages will be reversed and the case remanded for a new trial on damages.

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35. Kramer argues that the district court's order of retraction was designed to compel Thompson merely to live up to the promise to retract that he uttered during trial in an attempt to lessen damages. In view of the foregoing discussion, this argument, even if factually correct, would not carry the day. At all events, we find no support for this argument in the record. Thompson's rambling and recalcitrant testimony hardly amounted to a promise to retract. Moreover, the record reflects that when the issue of retraction was raised by the jury, the district court initially inquired of Thompson's lawyer whether he thought his client would consent to retract. Before the lawyer could respond, and before anyone consulted with Thompson himself, the district court announced that it would compel retraction regardless of Thompson's consent.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 90-1488

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STEVEN M. KRAMER,

Appellee

v.

RICHARD THOMPSON,

Appellant

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On Appeal From The United States District Court For The Eastern District of Pennsylvania (D.C. Civ. No. 89-02679)

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Argued: November 30, 1990

Before: BECKER, NYGAARD and ALITO, Circuit Judges.

(Filed: October 15, 1991)

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OPINION OF THE COURT

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BECKER, Circuit Judge.

This is an appeal by Richard Thompson from a large damages judgment,

permanent injunction, and other orders entered against him as the result of a libel action brought by his former attorney Stephen Kramer. The facts and procedural history of the dispute have been recounted in a companion opinion filed this date, Kramer v. Thompson, No. 90-1640 (3d Cir. ___, 1991), which considers at length, and reverses, those portions of the permanent injunction that compelled Thompson to retract various libelous statements in the future. We therefore need not rescribe them here. This opinion considers Thompson's allegations of trial error, which, in his submission, undermine the verdicts on liability and damages. For the reasons that follow, we affirm on liability, finding no reversible error. However, because we conclude that the district court improperly excluded evidence of Kramer's general reputation, offered in

mitigation of damages, we reverse and remand for a new trial on damages.

A. The Counterclaim for Legal Malpractice

Thompson alleges that the district court improperly dismissed his counterclaim for legal malpractice against Kramer, who had not represented him since 1986, on the ground that it was barred by Pennsylvania's two-year statute of limitations. See 42 Pa.C.S.A. Section 5524. Thompson contends that this two-year limitation applies only to legal malpractice actions brought under a trespass theory, and that his counterclaim should have been allowed under the four-year limitations period applicable to malpractice actions brought under an assumpsit theory. See Pa.C.S.A. Section 5525(4); Guy v. Liederbach, 501 Pa. 47, 459 A.2d 744 (1983); Garcia v. Community Legal Services Corp., 362 Pa.

Super. 484, 524 A.2d 980 (1987).

We need not resolve Thompson's statute of limitations argument, for we believe that Thompson's counterclaim properly could have been dismissed on an alternate ground -- for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6). Thompson's pro se answer to Kramer's complaint, which contains his counterclaim, is rambling, conclusory, contains numerous irrelevant statements and general allegations, and is quite nearly unintelligible. App. at 14-20.[3] The only portion of this response that even remotely appears relevant to a counterclaim for malpractice is a list of cases in which Kramer is a party and which Thompson includes "as evidence of Kramer's malpractice." App. at 16. There is nothing there to suggest under what

[3]The answer was not amended after Thompson retained counsel.

theory, trespass or assumpsit, Thompson seeks to proceed. More importantly, Thompson's response states none of the elements of legal malpractice. See Bowman v. Abramson, 545 F. Supp. 227 (E.D. Pa. 1982); Bangert v. Harris, 553 F. Supp. 235 (M.D. Pa. 1982); Garcia, 362 Pa. Super. 484, ___ A.2d ___ (1987). His response thus falls well short of the minimum requirements necessary to state a claim for legal malpractice under any theory.

B. Grant of Directed Verdict at Close of Plaintiff's Case

Thompson contends that the district court committed reversible error when it granted a directed verdict for Kramer on the issue of liability at the close of Kramer's case. Although it is a rare case in which we would approve of the issuance of a directed verdict against a defendant prior to his opportunity to

present a defense, under the unique facts of this case we are satisfied that the district court did not commit error. Kramer conducted a lengthy direct examination of Thompson as part of his case. App. at 444-641. Thompson's testimony can only be characterized as hostile, uncooperative, and deliberately evasive. More importantly, Thompson's testimony clearly demonstrated that he has absolutely no foundation, apart from his own mental concoctions, for the numerous and bizarre defamatory statements that he issued about Kramer.[4] Indeed, Thompson later admitted that the statements were untrue. App. at 725-740. Under these circumstances, we cannot say

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[4]As is set forth in our companion opinion, Thompson repeatedly charged that Kramer:

> (1) had "thrown" Thompson's case; (2) had deliberately destroyed certain documents related to the case; (3) had used drugs and was a member of the highly publicized "Yuppie Drug Ring" organized by Philadelphia dentist Lawrence Lavin; (4) was connected to organized crime; and (5) had committed arson on his own car.

that it was error for the district court to conclude that Thompson had no legal defense against Kramer's claim of libel and that it was unnecessary to wait until the close of Thompson's case to direct a verdict.

C. Was The Statement "I Think Kramer Burnt His Own Car" a Non-Libelous Statement of Opinion?

Thompson claims that his statement that "I think Kramer Burnt His Own Car" -- one of the four allegedly defamatory statements that he made -- was not libelous because it was no more than a statement of his opinion. Thompson cites Baker v. Lafayette College, ___ Pa. ___, 532 A.2d 399 (1987), for the proposition that an expression of opinion alone does not constitute defamation under Pennsylvania law. Thompson, however, fails to comprehend the full scope of Baker, which states:

> [O]pinion without more does not create a cause of action in libel. Instead, the "allegedly libeled party must demonstrate that the communicated opinion may reasonably be understood to imply the existence of undisclosed defamatory facts justifying the opinion."

Id. at ___, 532 A.2d at 402 (citations omitted).

One look at the letter in which Thompson issued this statement confirms that it was not mere opinion as contemplated by Baker.

> Confirming my long talk with you this PM, I think Kramer burnt his own car because of over 80 Judgments against him in Phila. alone, and he can't make the payments! There is no way an air conditioner can cause a diesel car to have an engine fire, let alone feed the flames with enough slow burning diesel oil to engulf a car -- it had to be torched. You can sue the expert for fraud, along with Kramer and Groves; this case follows his pattern of racketeering (his partner, Mark Stewart of WMOT Records, launderer for Larry Lavin's Yuppy Drug Ring, burned down the Arena to coverup financial problems). Also see my case 82-3128, it contains Kramer's malicious law suit against me after throwing our stock fraud case against Prudential Bache Securities. This is how he covers up his incompetence. I believe he still

> has connections in the cocaine trade, and with the underworld, from South Philadelphia, to Atlantic City, New York, and Las Vegas.

App. at 72 (emphasis added).

The clear innuendo in this passage is that Kramer "burnt his car" as part of a :pattern of racketeering" and generally criminal and fraudulent behavior. Even if Thompson is correct that his statement that "I think Kramer burnt his car," as supported by his allegation that Kramer had a financial motive to commit arson and that Kramer's car was mechanically incapable of burning, would by itself not be libelous, see Restatement (Second) of Torts Section 566 (1977), when this charge was made in connection with a host of other unsupported defamatory statements, all either asserting or at the least "imply[ing] the existence of undisclosed defamatory facts justifying the opinion," the libelous nature of the statement becomes clear. The court did

not commit error in holding that the statement was per se libelous.

D. The Contention That Some of the Allegedly Defamatory Statements Were Protected by the United States and Pennsylvania Constitutions and/or Privileged Under Common Law

Thompson claims that some of the statements that he issued about Kramer, set forth in letters to public officials, were intended to "petition the government for redress of grievances," and thus should have been deemed protected or privileged by the First Amendment of the United States Constitution, by Article I, section 7 of the Pennsylvania Constitution, and by Pennsylvania common law. We reject this argument for three reasons.

First, at no time during trial did Thompson ever raise a claim that some of his statements were protected or

privileged. Hence, this argument was waived.

Second, to the extent that statements allegedly intended to "petition the government for redress of grievances" generally are protected or privileged, it is clear that such status nonetheless can be forfeited if the true purpose of the statements is to injure the plaintiff.

> Liability can be imposed for activities ostensibly consisting of petitioning the government for redress of grievance only if the petitioning is a sham, and the real purpose is not to obtain governmental action but to otherwise injure the plaintiff.

Sierra Club v. Butz, 349 F. Supp. 934 (N.D. Call. 1972). We think it clear from the record as a whole that Thompson never had a genuine grievance against Kramer, at least not one that would appear genuine to any mind but his own. As such, it is clear that Thompson's true motive was not to seek redress of a

grievance through the machinery of government. Consequently, we cannot say that it would have been error, had Thompson even raised the issue, for the district court to have denied protected status to most of Thompson's statements.

Third, even if those statements issued to government agencies or officials capable of disciplining Kramer are considered protected, the fact remains that the vast majority of the 160 statements issued by Thompson were sent either to individuals outside of the government or to government officials who were not in a position to redress Thompson's grievances. Therefore, the district court's failure to instruct the jury that some small portion of those statements may have been protected or privileged is harmless error in the context of the entire case and of the injury to Kramer's reputation brought

about by Thompson's multitude of libelous utterings.

E. Exclusion of Evidence of Kramer's General Reputation

Thompson argues that the district court improperly excluded evidence of "Kramer's generally poor reputation in the Philadelphia legal community." Such evidence, Thompson claims, should have been permitted to rebut and mitigate Kramer's claim that his reputation had been damaged by Thompson's statements. See Corabi v. Curtis Publishing Co., 441 Pa. 432, 273 A.2d 899 (1971); Marcone v. Penthouse International Magazine for Men, 754 F.2d 1072 (3d Cir. 1985).

Although the parties agree that Thompson has correctly stated the law, the district court, in a series of colloquies, disagreed, repeatedly advising Thompson's counsel that evidence of Kramer's general reputation as a

lawyer, i.e., his reputation as to his general status in the legal community and his reputation among other lawyers, was inadmissible.[5]

These rulings were in limine. Although in a post-trial affidavit (in support of his motion for a new trial), Thompson represented that he had intended to call Philadelphia attorney Harris Bock to testify concerning Kramer's general reputation, Bock was never called. However, under the authority of American Home Assur. v. Sunshine Supermarket, 753 F.2d 321 (3d Cir. 1985), it was not necessary to call Bock to preserve the issue. In American Home Assurance we

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[5]The district court made one exception:

> My ruling would be that your opening statement and the evidence would be limited to the statements, Mr. Kramer's reputation on the items that Mr. Kramer raises as being libelous. If Mr. Kramer raises arson, them you can put into evidence something about arson. If he raises cocaine distribution, and if you have something concrete as to Mr. Kramer's bad reputation in the area of drug distribution, then you can put it on. If you have something about underworld dealings you can put it on.

held that a definitive oral ruling made in limine, with no suggestion that the court would reconsider the matter at trial, was sufficient to preserve an evidentiary objection for appeal even though an objection was not made at trial to the allegedly offending question.

It is clear that the district court's refusal to admit evidence of Kramer's general reputation was error. Had Thompson adduced evidence that Kramer's general reputation as a lawyer was poor, the large compensatory damages award might have been much smaller. Accordingly we cannot say that the error was harmless. Therefore, although our disposition of Thompson's claims of trial error requires us to affirm the judgment on liability, we must vacate the award of damages.[6] The judgment of the district

[6]Because we set aside the damages award, we need not address Thompson's claims: (1) that the district court erroneously permitted the jury to receive evidence of allegedly libelous communications dating back to October, 1985, even though the

court will be vacated and the case remanded for a new trial on the issue of damages.

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TO THE CLERK:

Please file the foregoing opinion.

_____
Circuit Judge

DATED:

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Pennsylvania statute of limitations for libel actions should have restricted Kramer's claim for damages to communications after April 12, 1988 -- the date one year before commencement of this action, see 42 Pa.C.S.A. 5523(1); and (2) that the district court improperly excluded evidence of Thompson's state of mind.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 90-1488, 90-1640

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STEVEN M. KRAMER,

Appellee

v.

RICHARD THOMPSON,

Appellant

(D.C. Civ. No. 89-02679)

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SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

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PRESENT: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, and ROTH, Circuit Judges

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The petition for rehearing filed by Appellant, having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active

service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

DATED: Nov. 14, 1991